UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

and

Cases: 04-CA-086325

04-CA-087233

04-RC-086261

GRAPHIC COMMUNICATIONS CONFERENCE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14-M

EMPLOYER'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO EMPLOYER'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Oberthur Technologies of America Corporation ("Oberthur"), by its undersigned counsel, hereby submits this Reply to the Answering Brief filed by Counsel for the Acting General Counsel ("GC") in response to Oberthur's Exceptions to the Decision of the Administrative Law Judge.

I. The Board Lacks the Authority to Adjudicate this Appeal Based on the Lack of a Quorum Appointed in Compliance with the Constitution.

As noted in Oberthur's Exceptions to the Decision of the Administrative Law Judge, the D.C. Circuit recently determined that the recess appointments to the Board made by President Barack Obama were not constitutionally valid pursuant to the Recess Appointments Clause. *See Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013). In light of the Supreme Court's decision in *New Process Steel LP v. N.L.R.B.*, 130 S.Ct. 2635 (2010) that the Board cannot legally function without three confirmed members, the *Noel Canning* decision dictates that the Board as presently constituted lacks the authority to decide the instant appeal.

The primary thrust of the GC's response to Oberthur's argument on this point is to cite the fact that the D.C. Circuit acknowledged that other courts considering the Recess Appointments Clause had applied a differing construction. [GC Answering Brief, p. 8]. The other decisions referenced by the GC, however, did not involve cases to which the Board was a party. There has now been an express holding, in litigation to which the Board is a party, that the Board lacks a quorum. Further, while the GC references the fact that the matter "remains in litigation," any further review of the D.C. Circuit's decision would be at the Supreme Court's discretion. Given the result reached by the D.C. Circuit, as well as the present posture of the *Noel Canning* litigation, Oberthur respectfully requests that the Board refrain from consideration of this Appeal until it has a validly confirmed quorum.

II. The Record Does Not Support the ALJ's Conclusion that Oberthur Restricted Discussion of the Union in Violation of Section 8(a)(1).

The ALJ found that Oberthur violated Section 8(a)(1) of the Act based on a finding of fact that supervisor Frank Belcher instructed employees "that they could not talk about the Union to other employees except in areas other than the work floor or on non-work time." [Decision, p. 6]. In its Exception Five, Oberthur noted the inherent contradiction between the ALJ's finding that the limitation set forth by Belcher applied only on the work floor during work time and the ALJ's conclusion that such a limitation was "overly broad and would prohibit employees from talking about the Union at times and places which would not interfere with either their own work or the work of others." [Decision, p. 6].

In the GC's Answering Brief, the GC addresses this inconsistency by asserting that the ALJ's Decision should be interpreted as concluding that even a limitation which applied only during work time on the work floor was overbroad because "Union speech" would not interfere with work "even on the plant floor or during working time." [GC Answering Brief, p. 13]. Assuming arguendo that such a construction reflects the ALJ's intention – as opposed to the GC's own effort to reconcile the explicitly inconsistent provisions of the ALJ's decision – such a finding is wholly lacking support in both the ALJ's Decision and the GC's Answering Brief. The suggestion that the ALJ could validly determine that Oberthur was required to accept an unspecified level of non-work discussion on during worktime under penalty of an unfair labor practice—charge—based—on—nothing—more—than—the—bald—assertion—that—such—talk—would—not substantially interfere with work production flies in the face of the principle, consistently recognized by the Board, that "Working time is for work." Our Way, Inc., 268 N.L.R.B. 394, 394 (1983).

The GC's attempt to distinguish *F.P. Adams Co. Inc.*, 166 N.L.R.B. 967 (1967) is likewise without merit. The GC suggests that *F.P. Adams* is inapposite on the grounds that, unlike in that case, Oberthur did not have a pre-existing rule about talking on the plant floor at the time the Union's organizational campaign began. [GC Answering Brief, p. 14]. That argument simply ignores the facts of *F.P. Adams*.

F.P. Adams involved an unfair labor practice charge arising out of an employer's announcement of a policy directing that "No person will be allowed to carry on union organizing activities on the job. Anybody who does so and who thereby neglects his own work or interferes [sic] with the work of others will be subject to discharge." 166 N.L.R.B. at 967. Contrary to the GC's suggestion that F.P. Adams is distinguishable due to the fact that Oberthur did not have a "no-talking rule" in place prior to the Union organizing campaign, the employer in F.P. Adams announced the above quoted policy two weeks after the start of organizational activity. Id. The employer in F.P. Adams went on to issue a second notice advising employees that "... no employee will be allowed to carry on activities for or against the union on working time If you want to talk about the Dodgers or Angels, whichever your favorite baseball team may be, or about anything else before or after work, during meal periods and during rest periods, this, of course, is your privilege." Id. (emphasis in original).

The Board in *F.P. Adams* dismissed the unfair labor practice charge filed in response to the employer's announcement of the above quoted policy. The Board noted specifically that "[t]he rule on its face is presumptively valid since it seeks to regulate employee activity only during working hours." *Id.* This was the case notwithstanding the fact that the policy explicitly barred "union organizing activities" and, moreover, expressly threatened employees who

violated the policy with discharge. The Board nevertheless concluded that the record did not "substantiate a finding of unlawful motivation in the promulgation of the rule." *Id.*

The language used by Belcher in communicating with the employees under his supervision is far less coercive than the language deemed acceptable by the Board in *F.P. Adams*, and the record in this case is likewise devoid of evidence of "unlawful motivation in the promulgation of the rule." The ALJ credited Belcher's affidavit testimony confirming that he expressly made clear that communication about the Union in "the break room, parking area, bulletin board area, and the hallway" and other non-work areas was permitted. [Decision, p. 6]. Likewise, the fact that (unlike in *F.P. Adams*) the announcement of the limitation of discussion on the work floor was not accompanied by any threat of discipline, as well as the fact that no employee was ever actually disciplined or threatened with discipline, demonstrates the absence of an "unlawful motivation" for the rule. Belcher's own testimony further refutes any suggestion of an unlawful motive:

The only thing I can say is my focus – as far as the meetings are concerned, my was not union. My focus was the – trying to get the employees not to be gathering around, congregating in their areas and not producing work. Okay. Even in the situation with my lead, Nicole, coming to me and asking me, you know, if I could speak to the employees, because they were standing around rather than producing. There was work that we needed to get to the stamp machines and if they're standing around talking rather than operating the reduction machines. I'm not going to get my production out to the stamper.

So my meeting with the employees was more to look, you guys can't stand around and not run your machines. I mean that was my main focus. I mean it really wasn't, you know, about what they were talking about. I mean it was just a matter – I mean they could have been talking about summer camp. You know, I just wanted them to make sure they were doing their work and not holding up production.

[Tr., pp. 375-76].

In sum, for the reasons stated herein and in Oberthur's Exceptions to the Decisions of the Administrative Law Judge, the ALJ erred in finding that Oberthur violated Section 8(a)(1) of the Act by virtue of its communications to employees concerning discussions on the work floor during working time, and Oberthur respectfully requests that the Board enter an order dismissing the unfair labor practice charge.

III. The Record Does Not Support the ALJ's Conclusion that Oberthur Violated Section 8(a)(1) and (3) by Freezing Bonuses and Wage Increases During the Period of Time Leading Up to the Election or by Communicating this Decision to its Employees.

The ALJ concluded that Oberthur violated Sections 8(a)(1) and 8(a)(3) of the Act by temporarily suspending payouts of wage increases and spot bonus during the period immediately preceding the election. [Decision, p. 12].

There is no dispute that Oberthur made a decision to place a hold on the payment of wage increases and bonuses prior to the election. At the outset of its argument, the GC asserts that Oberthur unlawfully "failed to act 'as if the Union were not on the scene," yet the GC subsequently acknowledges that an employer may refrain from implementing wage increases where the sole reason for the decision is to avoid the appearance of impropriety. [GC Answering Brief, p. 25]. The GC nevertheless argues that that Oberthur's conduct violated the Act because the company failed to adequately inform employees that the wage increases and bonus payments would be restored following the election and that the reason for the delay was to avoid the appearance of vote buying.

Such a position is untenable in light of the GC's acknowledgements as to Oberthur's communications with its employees regarding the hold on payouts of wage increases and

bonuses. As noted by the GC, Oberthur's Human Resources Manager, Diane Ware, instructed the company's supervisors to advise employees that "During this period, we have to keep the status quo on all issues related to wages, transfers, and promotions." [GC Answering Brief, p. 18]. Ware's email specifically directed the supervisors not to suggest to employees that the Union was responsible for the decision, or that payments would be processed contingent on the results of the election, i.e. "once we vote the union down." [Id.]. Finally, the email made plain that Oberthur's purpose in implementing the hold was to avoid the perception that "we are trying to 'buy' an employee's 'NO' vote." [Id.].

The GC's contention that Oberthur's communications to its employees were insufficient to avoid a violation of the Act amounts, notwithstanding the GC's assertion to the contrary, to an argument that Oberthur failed to use the necessary "magic words" in describing the temporary hold to its employees. Such a "magic words" requirement has been explicitly disavowed by the Board. *See Sam's Club*, 349 NLRB 1007, 1013 (2007).

In sum, Ware's communications regarding the hold on increases and bonuses disclose that its sole purpose was to avoid the appearance of vote-buying in connection with the election, and the record contains no evidence whatsoever of an unlawful intent. Further, Oberthur's communications made clear that the hold was being adopted only for a limited period in order to preserve the status quo in the time leading up to the election. Given the purpose for which the hold was implemented, as well as the fact that all payments which were delayed as a result of the hold were ultimately paid out to the employees after the election was held, Oberthur's conduct in implementing the hold did not violate Section 8(a)(1) or (3) of the Act. Finally, as set forth in Oberthur's Exception Seven, because Oberthur's implementation of the hold was not itself a violation of the Act, its conduct in informing of employees of the policy was also not a violation.

CONCLUSION

In light of the foregoing, and for the reasons set forth in Oberthur's Exceptions to the Decision of the Administrative Law Judge, Oberthur respectfully requests that the Board reverse the ALJ's findings that Oberthur violated Section 8(a) of the Act by limiting employee communications, by suspending payment of wage increases and bonuses during the period prior to the election, and by informing employees of the hold placed on wage increases and bonuses.

Dated: April 17, 2013.

WHITEFORD, TAYLOR & PRESTON, L.L.P.

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PROOF OF SERVICE

I am counsel to Respondent Oberthur Technologies of America Corporation in the instant proceeding. I am over the age of eighteen years and not a party to the proceeding; my business address is Seven Saint Paul Street, Baltimore, Maryland 21202.

On April 17, 2013, I caused the following documents to be served:

Employer's Reply Brief to Acting General Counsel's Answering Brief in Response to Employer's Exceptions to the Decision of the Administrative Law Judge

by electronic mail to:

Randy M. Girer Counsel for the Acting General Counsel National Labor Relations Board Region Four 615 Chestnut Street, 7th Floor Philadelphia, Pennsylvania 19106-4413

and

Thomas H. Kohn, Esquire Markowitz & Richman 123 South Broad Street, Suite 2020 Philadelphia, Pennsylvania 19109

Counsel for the Union.

Executed on April 17, 2013.

I declare under penalty of perjury under the laws of the State of Maryland that the foregoing Proof of Service is true and correct.

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